LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
APR 29 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

~~Misc.~~ No. 1037

JANAF, INCORPORATED, *Petitioner,*

v.

VICTOR J. ORSINGER, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

JOSEPH G. DOOLEY
Attorney for Respondent
1604 K Street, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Question Presented	1
Statutes and Rules Involved	2
Statement	2
Reasons Why the Writ Should Not Be Granted	6
1. Petitioner Has Not Stated Good Grounds For the Issuance of the Writ	6
2. The Decisions Cited by Petitioner Have No Bearing on the Question Before the Court	8
Conclusion	9
Appendix	1a

CITATIONS

CASES:

Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 1962, 371 U.S. 215	8
Thompson v. *Immigration and Naturalization Service*, 1964, 375 U.S. 384	8
Wolfsohn v. *Hankin, et al.*, 1964, 376 U.S. 203	8

STATUTES AND RULES:

28 U.S.C., Sec. 1257	2, 6
Rules 16 (a), 16 (b), 16 (g) of Rules of United States Court of Appeals for the District of Columbia Circuit	2, 5, 7
Rule 9 (b) of Rules of United States District Court for the District of Columbia	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Misc. No. 1037

JANAF, INCORPORATED, *Petitioner,*

v.

VICTOR J. ORSINGER, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Was the dismissal of the petitioner's appeal, by the Court of Appeals for the District of Columbia Circuit, proper?

STATUTES AND RULES INVOLVED

The pertinent statutes and rules involved are subsection 3 of Section 1257 of Title 28 United States Code, Rules 16 (a), 16 (b) and 16 (g) of the Rules of the United States Court of Appeals for the District of Columbia Circuit and Rule 9 (b) of the Rules of the United States District Court for the District of Columbia. The texts are set out in the appendix to this brief.

STATEMENT

The petitioner takes issue with the dismissal of its appeal by the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed for non-compliance with its rules governing preparation of a joint appendix. The order of dismissal is printed at page 8 of the Appendix to the petition herein.*

The Designation of Record in the Court of Appeals (Pet. App. 8-9) discloses, by inspection, that the initial complaint was dismissed on September 18, 1963 (id. No. 5). An amended complaint was dismissed on November 7, 1963 (id. No. 9). Against the second amended complaint, the respondent moved for summary judgment in the District Court (id. No. 11).

That motion was filed on November 22, 1963. Despite the requirements of Rule 9 (b) of the Rules of the District Court, which call for the opposing party to file a "statement of opposing points and authorities" the plaintiff's response consisted of no more than a

---

* Omissions from the petitioner's Appendix necessitated the preparation of an Appendix by the Respondent. Throughout this brief references to Respondent's Appendix will be "App. "; references to Petitioner's Appendix will be "Pet App. ".

half page statement denominated "Opposition to Defendant's Motion for Summary Judgment" which set out (App. 1a):

> "that there are genuine issues of fact with an issue by the pleadings, which have never been adjudicated by the United States District Court for the District of Columbia."

The affidavit alluded to in the statement as being "hereunto annexed" was not filed.

The succession of material events, from the date of inception of the litigation, is outlined in Chief Judge McGuire's memorandum to the Clerk of the District Court dated April 8, 1964 (App. 2a, 3a). The memorandum recites the dismissal of two pleadings, each time with leave to amend, counsel's withdrawal and a continuance from March 4, 1964 to April 7, 1964 of the hearing on the motion for summary judgment

> "to allow plaintiff opportunity to obtain counsel. No further continuances to be allowed on the motion. This by Judge Sirica.
>
> "On April 7, 1964, the motion was called before Judge Jones who entered a personal disqualification. Plaintiff at this time was still without counsel.
>
> "It is therefore ordered that plaintiff is given ten days from this date to obtain counsel, in default of which the motion for summary judgment is granted and the cause dismissed with prejudice."

The following day, Chief Judge McGuire rescinded his order and committed the matter to the Motions Court for the purpose of fixing a date for the hearing of the defendant's motion for summary judgment (App. 3a, 4a). At this point the motion had been

pending four and one-half months. On April 23, 1964, District Judge Curran, on the representation of the plaintiff's president (Pet. App. 10) that the plaintiff

> "would require thirty days to communicate its need for funds for the prosecution of this action to its stockholders"

ordered that plaintiff engage counsel and

> "cause such counsel to enter an appearance within thirty days from the date hereof".

In default of appearance or upon failure of counsel to be ready to proceed, the complaint would be dismissed. The motion was set for argument on May 25, 1964 (Pet. App. 10).

On May 25, 1964, counsel filed a belated appearance and requested more time for the preparation for argument (Pet. App. 11), flying directly in the face of the Court's order of thirty-two days before. Respondent's counsel objected, pointing out that the motion had been pending for six months and, further, that the respondent was defending, for the fifth time, a settlement made in District Judge Hart's Chambers three and one-half years previously (id.). District Judge Curran adhered to his order of April 23, 1964 and dismissed the complaint (Pet. App. 12, 13).

If ever a court's patience was tested and if ever a court tolerated delinquencies and delays, in the interest of affording a litigant a fair chance, the District Court did so here. Fully knowing that it must appear by counsel and be ready to proceed, the petitioner offered only a belated appearance by counsel, accompanied by a request for another delay.

On appeal to the Court of Appeals, new counsel appeared. Pursuant to Rule 16 (b), petitioner filed "a statement of the parts of the record" proposed to be printed in the joint appendix (Pet. App. 8, 9). Following the procedure prescribed, respondent here, the Appellee below, counter-designated portions of the record (Pet. App. 14); in bulk the material designated by the petitioner represented many times the quantity of material designated by the respondent. It was respondent's view that the material designated by the petitioner was essential to full consideration, including the merits of the matter, and it was the present respondent's intention to resort to all the material designated and counter-designated in preparation of his brief. Now, the petitioner decided to engraft personal motions on the rules of the Court of Appeals. The appendix filed was a fragment of the appendix the petitioner said it would file.

This self-fabricated procedure prompted the motion to dismiss the appeal. In support of the motion, counsel for the respondent filed an affidavit (App. 5a, 6a), advising the Court that he had contacted both petitioner's counsel and the petitioner's printer by telephone to determine whether the omissions complained of were deliberate or human error. The printer informed counsel that he had printed everything delivered to him; counsel for the petitioner said he, personally, did not know the reason for the omissions and he never called back to say why the omission had occurred.

After defaulting on the motion, petitioner received permission to file opposition, attaching a letter to counsel for the respondent (Pet. App. 17) which demonstrated that the abbreviated appendix was petitioner's

deliberate, unilateral decision, grounded in the thoughts (a) that there was enough there for the Court to decide what it had to decide and (b) doing what the petitioner said it would do in the first instance would "cause additional unnecessary expense."

Petitioner's counsel's affidavit (Pet. App. 18) restated the same position, adding

> "I stated (to Mr. Dooley) that I would advise him of any change in this position. Since there was no change, I found it unnecessary to further advise Mr. Dooley."

Responding to the belated opposition, counsel filed an affidavit (App. 7a, 8a), summing up the petitioner's several defaults since the filing of the Notice of Appeal, namely, (1) the failure to serve a copy of the Designanation of Record—which was corrected only after motion to dismiss, though a letter request had been made, (2) the disregard for the rules relating to the preparation of a joint appendix and (3) the default on the motion.

Evidently, the Court of Appeals felt that there was no compelling reason for further tolerance; the motion to dismiss was granted.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Petitioner Has Not Stated Good Grounds for the Issuance of the Writ

The petition purports to be founded on jurisdiction conferred by Section 1257 (3) of Title 28 of the United States Code. The subsection cited confers jurisdiction to review judgments or decrees of State courts where United States statutes or treaties are questioned on constitutional grounds, where conflict between a State

statute and a Federal statute or the United States Constitution is averred or where rights, privileges or immunities are claimed under the laws or the Constitution of the United States.

The simple question before the Court on this petition is whether a United States Court of Appeals was authorized to dismiss an appeal for deliberate breach of its procedural rules. All the departures which brought about the result were of the petitioner's making. The petitioner did not have to designate as much of the record as it did; it could have designated what it ultimately printed and forced the respondent to print the remaining parts at its own expense. Rule 16 (a) of the Court's rules provides in part:

> "Appellant shall print in the joint appendix the parts of the record which both parties desire printed, but if appellant considers that any parts of the record which appellee desires to print are not material to the questions presented and so notifies the appellee in writing, suitably identifying the parts, the appellee, if he wishes any of those parts printed, shall promptly arrange with appellant's printer for printing them in the joint appendix."

Instead of following the rule, the petitioner waited until the record was struck by designation and counter-designation and then went off on its own to print what it pleased. Now it resorts to Rule 16 (g) which guards against inadvertent omissions and permits him who slipped to make a written request of the clerk for leave to withdraw the joint appendix and correct the mistake.

This, the petitioner never was in a position to do. It had not lapsed; it had made its own rule. Compounding the wrong, instead of requesting the clerk to

make the appendix available for correction, petitioner's counsel wrote to respondent's counsel and said he believed he had done all that needed to be done.

The essence of this petition is extraordinary. It does not and cannot rest upon the section of the Judicial Code which is cited to support it. In reality it rests upon a tacit plea that this Court invalidate, rewrite or circumvent the internal management rules of the Court of Appeals.

Having ignored the District Court's order of April 23, 1964, by failing to file an appearance within the time appointed, having run counter to its directive that counsel be ready to proceed and having never observed the requirement of the local rules concerning the filing of papers in opposition to the motion for summary judgment, the petitioner would now extricate itself by the claim of a right to delay under Rule 6 (a) of the Federal Rules of Civil Procedure.

This claim can hardly be said to meet the criteria of Rule 19 of the rules of this Court which represent the guidelines for the exercise of this Court's discretion. Especially is this so in the setting in which counsel manifested a lack of readiness to proceed, so implicit in the request for another continuance.

2. The Decisions Cited By Petitioner Have No Bearing on the Question Before the Court

Petitioner would sustain its position on the authority of *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 1962, 371 U. S. 215, *Thompson* v. *Immigration and Naturalization Service*, 1964, 375 U. S. 384 and *Wolfsohn* v. *Hankin, et al.*, 1964, 376 U. S. 203.

Those cases are not in point. In each of them, the appellants, whose appeals were dismissed by the Court

of Appeals, had relied upon extensions of time granted by the District Court or upon a ruling of the District Court which had led the appealing party to believe that the period for filing a notice of appeal had been tolled.

In the cases cited, the Courts of Appeals had dismissed on jurisdictional grounds; here the Court of Appeals dismissed an appeal within its jurisdiction because of the petitioner's non-compliance with the rules everyone is expected to observe.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to review the order of dismissal entered by the Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

JOSEPH G. DOOLEY.
Attorney for Respondent
1604 K Street, N. W.
Washington, D. C.